Reserved Judgment

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Second Appeal No. 40 of 2003

1. **Bhuwan Chandra Tewari**
2. **Prakash Chandra Tewari,**
Both sons of late Shri Ishwari Tewari,
Both R/o Room No. 7, Himalaya Hotel Bhawan,
Gandhi Chowk, Sadar Bazar,
Ranikhet, District Almora

…… Appellants/ Plaintiffs

Versus

1. **M/s Harikishan Tewari & Sons,**
Retail Outlet Dealers
Bharat Petroleum Corporation Ltd. Through
Sri Amba Dutt Tewari, S/o late Harikishan Tewari
Gandhi Chowk, Sadar Bazar,
Ranikhet, District Almora.
2. **Shri Amba Dutt Tewari, S/o late Harikishan Tewari,**
M/s Harikishan Tewari & Sons,
Retail Outlet Dealers
Bharat Petroleum Corporation Ltd.
Gandhi Chowk, Sadar Bazar,
Ranikhet, District Almora.
3. **Sri Jagdish Chandra Tewari, S/o late**
Shri Harikishan Tewari,
Astt. Engineer (Retd.),
Lok Nirman Vibhag,
Joy Villa Compound, Geetanjali Bhawan,
Tallital, District Nainital.

……. Respondent/ Defendants

Mr. Mohan Chandra Pande, learned counsel for the appellants.
Mr. S.N. Babulkar, Sr. Advocate assited by
Mr. K.N. Joshi, learned counsel for respondents.

Hon'ble Prafulla C.Pant,J.

This second appeal is preferred under Section 100 of the Code of Civil Procedure, 1908, and is directed against the judgment and decree dated 13.03.2003 passed in Civil Appeal

No. 09 of 2001 by Shri V.K. Jain, the then learned District Judge, Almora.

2) The factual matrix of the case are that the plaintiffs-appellants filed Civil Suit No. 78 of 1998 before the trial Court for rendition of accounts against the partners of the partnership firm M/s Harikishan Tewari and Sons. As per the plaint allegations, Shri Harikishan Tewari, the grandfather of the plaintiffs –appellants, owned land and houses in Village Ratighat, Padli, District Nainital and he also owned shops in Sadar Bazar, Ranikhet, District Almora, apart from running the petroleum business in the name and style of 'M/s Harikishan Bhawani Dutt' since 1932. Shri Hari Kishan Tewari died in the year 1951 leaving behind his six sons as legal heirs shown in the pedigree in para 1 of the plaint. It is pleaded in the plaint that after death of Shri Harikishan Tewari, the petroleum business was being run by all the sons. On 02.04.1957, the name of the firm changed with the new name and style as 'M/s Harikishan Tewari and Sons' with all the six sons as partners. It is further pleaded in the plaint that the firm was not to be dissoloved due to the death of any of the partners, rather on the death of any of the six partners his heirs were to be deemed new partners of the firm. The firm was got registered by defendant No. 1 (through Shri Amba Dutt Tewari) with the Income-tax Office, Bareilly (now at Almora). A family settlement regarding entire movable and immovable properties of the business of late Hari Kishan Tewari was thereafter arrived at on 31.08.1959. In said settlement, as per the plaint, it was never mentioned in plaintiffs father Shri Ishwari Dutt Tewari (now dead) had ceased to be partner in the firm. Rather, the defendant No. 1 issued a letter on 21.10.1963 to the State Bank of India, Branch Ranikhet, showing that the petroleum business is being run by all six sons of late Shri Hari Kishan Tewari. Shri Pitambar Dutt Tewari, one of the sons of

Hari Kishan Tewari died in 1990. The second son, Narain Dutt Tewari died in 1974. The third son, Devi Dutt Tewari died in 1996, while the plaintiffs father Shri Ishwari Dutt Tewari has already died in 1964. Even after death of plaintiffs father, the defendant No.1 and defendant No. 2 and 3 represented to the Income-tax Officer, Almora, and State Bank of India, Branch Ranikhet, that the firm is being run by all the sons except Shri Pitambar Dutt Tewari. Finally, last family settlement of heirs of late Shri Hari Kishan Tewari, in respect of his movable and immovable properties, took place on 22.04.1996, in which the petroleum business of Hari Kishan Tewari still shown to be run by the partnership firm. Plaintiff No. 1 (Attorney holder of plaintiff No. 2) had further pleaded that due to the financial problems, he joined Army in July 1980 and got discharged from the Army in August 1984. However, he was not given his share of profits by the firm and had ultimately got issued notices dated 08.06.1988 through his counsel for payment of his share as well as share of his brother. On this the plaintiffs and defendant No.2 agreed that Rs. 600/- per month shall be paid to the plaintiffs from 1976 up to March 1988 in ten instalments, and thereafter rent shall be paid on year to year basis. As per the plaint, defendant No. 2 also agreed to pay profits out of the total income of petroleum business from the year 1978-79 at the rate of 33% of the profits. However, the defendant No.2 failed to comply the terms of the compromise. On this, the plaintiffs sent a notice on 06.02.1989 to State Bank of India with a request to stop payment of the firm M/s Harikishan Tewari and Sons, on which the payment was stopped and defendant Nos. 2 and 3 filed a suit No. 41 of 1989 against the State Bank of India. However, the same was dismissed in default and since then the defendant-firm has neither paid any share from the income of the firm nor accounts were shown to the plaintiffs. Hence, the suit was filed by the plaintiffs before the trial Court.

3) The defendants filed written statement and contested the suit with the pleadings that plaintiffs are not the partners of firm 'M/s Harikishan Tewari and Sons'. It is further pleaded that with the family settlement on 31.08.1959, the firm stood dissolved and the business of petroleum was allotted to the share of defendant Nos. 2 and 3, who are now sole owners and partners of the firm. However, it is further pleaded in the written statement that several members were shown as partners only to adjust the tax liability. It is further pleaded in the written statement that the plaintiffs are taking un- due advantage of said fact. The maintainability of the suit was challenged also on the ground of limitation.

4) The learned trial Court framed, in all seven issues, and after recording the evidence and hearing the parties, had decided all the issues against the plaintiffs and in favour of the defendants except the preliminary issues relating to valuation and court fee, and dismissed the suit vide judgment and decree dated 14.09.2001. Aggrieved by said judgment and decree the plaintiffs preferred Civil Appeal No. 08 of 2001 before the learned District Judge, Almora, who after hearing the parties reversed the findings on issue No. 1 and held that plaintiffs are the partners of the firm but found the suit barred by time and dismissed the appeal vide judgment and order dated 13.03.2003 (as such, to the extent of finding on issue No. 4 i.e. relating to limitation, and issue No. 7, relating to entitlement of relief, the trail Court's findings were upheld) Aggrieved by both the above judgments and orders, the present appeal is preferred by plaintiff-appellants.

5) The substantial questions of law involved and formulated in the appeal are as under:

i) Whether, for the suit on accounting by a partner, dissolution of the partnership firm is necessary?

ii) Whether, in a suit for accounting by partner, in a subsisting partnership firm the limitation shall run from the date when the concerned partner refuses to give accounts?

6) I heard learned counsel for the parties and perused the record.

7) First of all, I may mention that finding of learned Lower Appellate Court on issue No. 1 framed by the trial Court has become final in view of Order 41 Rule 22 of the Code of Civil Procedure, 1908, as the same has not been challenged by any of the parties to the suit. Therefore, this Court proceeds further treating that the plaintiffs have proved themselves to be the partners of the partnership firm 'M/s Harikishan Tewari and Sons'.

8) Before further discussions, it is pertinent to mention here the relevant provision of law relating to the case. Section 6 of [The Indian] Partnership Act, 1932 reads as under:

*"6. **Mode of determining existence of partnership.-** In determining whether a group of persons is or is not a firm, or whether a person is or is not a partner in a firm, regard shall be held to the real relation between the parties, as shown by all relevant facts taken together.*

***Explanation I.-** The sharing of profits or of gross returns arising from property by persons holding a joint or common interest in that property does not of itself make such persons partners.*

***Explanation 2.-** The receipt by a person of a share of profits of a business, or of a payment contingent upon the earning of profits or varying with*

the profits earned by business, does not of itself make him a partner with the persons carrying on the business;

and , in particular, the receipt of such share or payment-

(a) by a lender of money to persons engaged or about to engage in any business.

(b) by a servant or agent as remuneration,

(c) by the widow or child of a deceased partner, as annuity, or

(d) by a previous owner or part owner of the business, as consideration for the sale of the goodwill or share thereof,

does not of itself make the receiver a partner with the persons carrying on the business.

From the above provision of law, it is clear that for determining whether a person is or is not a partner of the firm regard is required to be had to the real relation between the parties. Learned lower Appellate Court has given the detailed reasons for the findings and held that the plaintiffs are partners of the firm running the petroleum business. Learned counsel for the defendant-respondents argued that merely by showing the name of plaintiffs as partners for saving the Income-tax, they did not become real partners. I am unable to agree with the submissions advanced on behalf of the defendant-respondents for the reason that once they projected the plaintiffs as partners they are barred from denying status of partner of the plaintiffs by the principle of estoppels. Otherwise also, one cannot be permitted in law to be flexible to the extent that he can by pass the liability as per the Income –tax law and once that statement has been believed, he cannot be permitted to deprive the plaintiffs from giving their share of profits.

9) Now I come to the question of law relating to the requirement of dissolution for rendition of account. Neither learned counsel for the plaintiff-appellants nor the defendant-

respondents could show me any law if the dissolution is necessary before a suit of rendition of account is filed by a partner. Chapter VI containing Sections 39 to 55 of the Partnership Act, 1932, deals with the dissolution of the partnership firm. Section 48 of the Partnership Act, 1932 deals only with the settlement of accounts of a firm after dissolution but it is nowhere provided in the Act if before dissolution a partner cannot seek rendition of account from the other partners who are running the business. As such, there is no bar in law as to the maintainability of suit of rendition of account without dissolution of the firm. Order XXX of the Code of Civil Procedure, 1908 also does not require any such condition. Therefore, the substantial question of law No. 1 as mentioned above is answered in negative and in favour of the plaintiff-appellants.

10) Now I come to the second question of law i.e. relating to limitation. Section 19 of the Partnership Act, provides that a partner is an agent of the partnership firm. And Section 22 of the Act, provide that in order to bind a firm, an act or instrument done or executed by the partner or other person on behalf of the firm shall be done or executed in the firm name. As such, a partner can certainly be said to be an agent of a firm. Now this Court has to see the provisions of Limitation Act relating to the suits of accounting. Part I of said Act containing Article 1 to 5 pertain to the suits relating to account, and Article 137 in Part II contains the residuary provisions relating to limitation. Article 1 to Article 5 and again in Article 137, it is only three year's period of limitation which is provided for filing the suit. That being so, in any case, the suit for rendition of account can be filed within a period of three years. Now it is to be seen from which date the period of limitation would start. It is settled principle of law as held by the Hon'ble Apex Court in Mir Abdul Khaliq Vs. Abdul

Gaffar Sheriff and others reported in A.I.R. 1985 Supreme Court 608 : (1985) 2 Supreme Court Cases 14, that in the case of dissolution of firm period of limitation starts from the date of dissolution and in other cases, it can be said to have started from the date it is demanded and refused. But since no money can be recovered after a period of three years of cause of action, as such the plaintiffs can seek rendition of only three years accounts prior to the year the suit is instituted. Record shows that the suit was filed on 8th on December 1998, as such the plaintiffs could have sought rendition of account only in respect of the period from 08.02.1995 and thereafter. That being so, once it is established as also mentioned by the learned lower Court that the plaintiffs are partners of the firm, the entire suit cannot be said to be barred by time but rendition of account could have been directed in respect of three years preceding the institution of suit and thereafter. Thereafter, in the opinion of this Court, the dismissal of suit on the ground that the whole suit is barred by time cannot be upheld and lower Appellate Court's decree to that extent is liable to be set aside. As such, while the suit for rendition of account should have been dismissed for the year prior to 08.02.1995.

11) Therefore, the appeal is allowed and impugned judgment and order passed by the lower Appellate Court, to the extent of finding and decree based on limitation, is set aside. The Civil Suit No. 78 of 1998 is decreed with costs for rendition of account for the three years prior to the institution of suit. Let a preliminary decree be prepared by the learned trial Court as provided in the Rule 16 of Order XX of the Code of Civil Procedure, 1908.

(Prafulla C.Pant,J.)

Dt.22nd November, 2004
H.Negi